Supreme Court, U.S.
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90-299

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WASTE CONVERSION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Petitioner requests that a writ of certiorari be issued to review the decision of the Commonwealth Court of Pennsylvania (No. 647 C.A. 1989), entered on January 8, 1990, which affirmed Petitioner's criminal conviction. This decision was rendered the final pronouncement of the state court of last resort by a *per curiam* order of the Supreme Court of Pennsylvania, entered on July 2, 1990, which denied Petitioner's timely application for discretionary appeal.

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THE QUESTION PRESENTED FOR REVIEW

Whether a penal provision of a Pennsylvania environmental statute violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it imposes upon a corporate consignor of solid waste vicarious criminal liability for the illegal disposition of that waste by the independent hauling contractor that accepted it for shipment.

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OPINION BELOW

The opinion of the Commonwealth Court of Pennsylvania (App. A, *infra,* pp. A-1 to A-9) is reported at _____ Pa. Cmwlth. _____, 568 A.2d 738 (1989).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) in that the decision below represents a final judgment of conviction rendered by the highest court of Pennsylvania in which a decision could be had, and Petitioner's challenge to the validity of the state criminal statute involved is grounded upon its repugnance to the Constitution of the United States.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner challenges the constitutionality of Section 610(8)(i) of the Pennsylvania Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.* (hereinafter the "Act"), which reads in pertinent part:

It shall be unlawful for any person or municipality to:

* * *

(8) Consign, assign, sell, entrust, give or in any way transfer residual or hazardous waste which is *at any time subsequently, by* any such person or *any other person;*

> (i) dumped or deposited or discharged in any manner into the surface of the earth or underground or into the waters of the Commonwealth unless a permit for the dumping or depositing or discharging of such residual or hazardous waste has first been obtained from the department [the Pennsylvania Department of Environmental Resources]; [emphasis added].

35 P.S. § 6018.610(8)(i)

"Person" is defined within the Act in Section 103 as follows:

"Person." Any individual, partnership, corporation, association, institution, cooperative enterprise, municipal authority, Federal Government or agency, State institution and agency (including, but not limited to, the Department of General Services and the State Public School Buildings Authority), or any other legal entity whatsoever which is recognized by law as the subject of rights and duties. In any provisions of this act prescribing a fine, imprisonment or penalty, or any combination of the foregoing, the term 'person' shall include the officers and directors of any corporation or other legal entity having officers and directors.

35 P.S. § 6018.103

The maximum penalty, which can be assessed against a corporation upon conviction for violating Section 610(8)(i) of the Act, is defined in Section 606(b) as follows:

Any person other than a municipal official exercising his official duties who violates any provision of this act, any rule or regulation of the department, any order of the department, or any term or condition of any permit, shall be guilty of a misdemeanor of the third degree and, upon conviction shall be sentenced to pay a fine of not less than $1,000 but not more than $25,000 per day for each violation or to imprisonment for a period of not more than one year, or both.

35 P.S. § 6018.606(b)

Petitioner asserts that Section 610(8)(i) of the Act, both on its face and as applied to the facts found by the trial court, violates the Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part: "*** nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner is a corporation* which operates a permitted, hazardous and non-hazardous, industrial waste treatment and temporary storage facility situated in eastern Pennsylvania. In September, 1987, Petitioner hired Wills Trucking Company (hereinafter "Wills"), an Ohio based hauling contractor both legally and operationally unaffiliated with Petitioner, to transport a truckload of non-hazardous solid waste to a Michigan landfill for disposal. Petitioner had used Wills to perform comparable waste transportation services on many prior occasions without incident.

While traversing a mountainous region of central Pennsylvania, Wills' truck experienced some difficulty in negotiating a hill.[1] Wills' driver backed the truck to more level ground and endeavored to redistribute the load. In the process he raised the truck bed. The tailgate, which he claimed came unlatched as a result of a loss of air pressure, opened, and a substantial amount of the

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* Petitioning corporation's parent company is Stout Environmental, Inc. of Thorofare, New Jersey.

1. Although it was stipulated at trial that the gross weight of the full truckload of waste, as measured by Petitioner's uncertified axle scale, exceeded by from 1,500 to 3,500 pounds the 80,000 pound gross highway vehicle weight limit applicable in Pennsylvania, the Commonwealth Court of Pennsylvania correctly ignored this irrelevancy in rationalizing its challenged affirmance of Petitioner's criminal conviction. Section 610(8)(i) demands no proof of conduct by the accused other than that such "person" have transferred waste which is later illegally handled by "any other person". Furthermore, the stipulated facts, which comprise the trial record, confirm that Wills' driver accepted the shipment without comment with knowledge of the truck's apparent gross weight, despite the fact that legal responsibility for operating an overweight vehicle in Pennsylvania rests *solely* with the vehicle's owner/operator. 75 P.S. 4901(a). Finally, there is no evidence in the trial record that the sudden release of the truck's tailgate, which the driver claimed to have allowed waste to spill to the ground, was proximately caused by the weight of the load as opposed to an unpredictable equipment malfunction.

waste slid out onto the roadside. Without notifying anyone, he secured the tailgate and drove on to the Michigan landfill, where the balance of the load was legitimately disposed.

Approximately one week later, Pennsylvania environmental authorities were able to trace the origins of the spill to Petitioner. Within twenty-four hours of receiving notice of the situation, Petitioner voluntarily cleaned up the illegally discharged waste.

Wills and its driver were criminally charged under the Act, by the Environmental Crimes Section of Pennsylvania's Office of the Attorney General, with illegal waste dumping. Petitioner was separately charged with violation of Section 610(8)(i) of the Act as a misdemeanor solely because it had been the consignor of the original waste shipment. It is the constitutionality of this unprecedented imposition of vicarious criminal accountability that Petitioner respectfully asks this Court to review.

Petitioner filed a timely motion with the Lycoming County Court of Common Pleas (hereinafter the "trial court") to quash the criminal information and to declare Section 610(8)(i) of the Act unconstitutional on the grounds that, both facially and as applied, it violates the Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.[2] In its opinion in support of its order denying the motion, (App. B, infra, pp. A-10 to A-18), the trial court was not deterred by its recognition that Wills, in its relationship to Petitioner, was an independent contractor rather than an agent or employee amenable to Petitioner's supervision or control. (App. B, *infra,* p. A-17).

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2. The phrase "law of the land," which appears in Article 1, Section 9 of the Pennsylvania Constitution, is legally equivalent to "due process of law" as that phrase appears in the United States Constitution. *Commonwealth v. Heck,* 341 Pa. Super. 183, 491 A.2d 212 (1985), *aff'd.,* 517 Pa. 192, 535 A.2d 575 (1987).

Petitioner and the Commonwealth then agreed to a bench trial upon a stipulated evidentiary record. That record includes no evidence that Petitioner conspired in or had reason to anticipate Wills' mismanagement of the waste shipment. Furthermore, Petitioner had no warning that Wills' equipment might prove incapable of handling the shipment under normal road conditions. The account by Wills' driver (who was not a co-defendant) of the extraordinary circumstances, which allegedly gave rise to the illegal dumping, was introduced into evidence through the stipulated testimony of the government investigator who had interviewed him, presumably because, as an out of state resident, the driver would have otherwise been unavailable to the prosecution.

At trial, Petitioner renewed its constitutional objection to Section 610(8)(i) of the Act and argued in defense, under the authority of *United States v. Park*, 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed.2d 489 (1975), that the government had failed to prove beyond a reasonable doubt that it had been objectively possible for Petitioner to have prevented Wills' criminal acts. (App. C, *infra,* p. A-21). In its opinion and order entering a guilty verdict on the misdemeanor charge (App. C, *infra,* pp. A-19 to A-24), the trial court rejected this defense on the unprecedented ground that it was not available to a corporate defendant. (App. C, *infra,* p. A-22). Petitioner then filed a timely post-verdict motion in which it recapitulated the legal arguments advanced, both before and during the trial, attacking the legitimacy of its conviction. These included the constitutional infirmity of the vicarious criminal liability provision of the Act as an abridgment of fundamental due process. On December 27, 1988, the trial court entered an order without opinion denying Petitioner's motion. (App. D, *infra,* pp. A-25 to A-26).

On January 10, 1989, the trial court entered an order sentencing Petitioner to pay a fine of $10,000

pursuant to Section 606(b) of the Act which, *inter alia,* authorizes the imposition of fines of from $1,000 to $25,000 per day for each day that a violation of the environmental laws (by a third party in this case) remains unabated, whether known to the defendant or not. (App. E, *infra,* p. A-27). The trial court stayed payment of the fine pending the outcome of an anticipated appeal.

Petitioner perfected a timely appeal of its conviction to the Superior Court of Pennsylvania, which normally adjudicates criminal appeals. That court transferred the cause, *sua sponte,* to the Commonwealth Court because the constitutionality of a state statute appeared to be in issue. (App. F, *infra,* p. A-28).

The Commonwealth Court granted the Pennsylvania Chamber of Business and Industry leave to intervene as *amicus curiae* on Petitioner's behalf. (App. G, *infra,* p. A-29). The Pennsylvania Department of Environmental Resources was permitted to intervene in support of the Commonwealth. Both amici filed briefs. Petitioner's brief reaffirmed the due process challenge to Section 610(8)(i) of the Act, as an unconscionable extension of the ambit of vicarious criminal liability. It also asserted that the trial court erred in rejecting out of hand Petitioner's objective impossibility defense. Finally, Petitioner advanced the public policy argument that the chilling commercial impact of the vicarious liability provision defeated the legislative intent to foster resource recovery and private management of waste expressly recited in the Act. 35 P.S. 6018.102(2) and (11).[3]

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3. The legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare, it is the purpose of this act to:

* * *

(2) Encourage the development of resource recovery as a

On January 8, 1990, after abbreviated oral argument on November 15, 1989, the en banc Commonwealth Court entered an order (with supporting opinion) affirming Petitioner's conviction. (App. I, *infra,* p. A-31). Petitioner then filed a timely application to the Pennsylvania Supreme Court for discretionary review of the Commonwealth Court decision based upon the same constitutional issues. On July 2, 1990, the Supreme Court denied the application *per curiam* without opinion. (App. H, *infra,* p. A-30). This Petition followed.

REASONS FOR GRANTING THE WRIT

In this case, the highest appellate court of Pennsylvania available to speak on the issue has sustained the federal and state constitutionality of a statutory provision which extends the basis of vicarious criminal liability to include, for the first time, the acts of independent contractors and other third parties legally unrelated to the defendant. Section 610(8)(i) of the Act, both on its face and as applied to the facts of this case, abandons the indicia which have traditionally been relied upon to rationalize the imputation of the criminal conduct of one person to another. It does not require the government to prove criminal intent, scienter, conspiracy, complicity or negligence on the part of the vicariously accused to obtain a conviction.

Petitioner's conviction was not predicated upon evidence that it aided and abetted Wills' active criminal behavior or that it actually anticipated or reasonably

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NOTES *(Continued)*

means of managing solid waste, conserving resources, and supplying energy;

* *

(11) Utilize, wherever feasible, the capabilities of private enterprise in accomplishing the desired objectives of an effective comprehensive solid waste management program.

35 P.S. § 6018.102.

should have anticipated the anomalous outcome. Rather, the mere fact that Petitioner initially placed waste in the stream of commerce exposed Petitioner to substantial criminal penalties based solely upon the illegal conduct of a third party subsequent in the chain of custody of that waste. Section 610(8)(i) of the Act held Petitioner accountable for a bizarre transgression by a third party who was neither legally nor practically responsive to Petitioner's supervision or control.

I

This Court should grant certiorari to settle the question of whether the extension of vicarious criminal liability to reach the conduct of an independent contractor retained by a defendant violates due process of law, as guaranteed by the Fourteenth Amendment.

Petitioner submits that this result is unprecedented in United States jurisprudence. No decision by this Court or any other federal or state appellate tribunal has ever sustained so attenuated a foundation for criminal conviction. Even in matters of public welfare and safety, in which the government enjoys the most unbridled exercise of its police powers, this Court has refused to sanction vicarious criminal accountability unless the defendant stands in a responsible relationship to the active wrongdoer(s).

In those few cases in which this Court has heretofore addressed the propriety of holding one party criminally answerable for another's conduct, it has never been called upon to affirm a conviction where the defendant lacked either the legal right or the practical means of preventing or mitigating the harm caused by the primary lawbreaker. The seminal case of *United States v. Dotterweich,* 320 U.S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943), and its progeny, *United States v. Wiesenfeld Warehouse Company,* 376 U.S. 86, 84 S. Ct. 559, 11 L. Ed.2d 536 (1964), and *United States v. Park,* 421

U.S. 658, 95 S. Ct. 1903, 44 L. Ed.2d 489 (1975), clearly demonstrate this Court's sensitivity to the constitutional limits of imputed criminal liability. In these cases, the Court affirmed convictions of corporate presidents or sole proprietors for absolute liability offenses committed by their commercial enterprises under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 331(a) and (k) respectively. The Court held these officer/managers accountable for crime attributable to their own employees or agents only because "by virtue of their managerial positions or other similar relation to the actor [they] could be deemed responsible for its commission." *United States v. Park, supra,* 95 S. Ct. at 1911.

This Court has never wavered from this salutary principle, which is akin to *respondeat superior* in tort. Never has it seen fit to stretch the limits of vicarious accountability to include the criminal acts of independent contractors, whose employees are not normally amenable to control by the parties who retain them. Petitioner submits that Section 610(8)(i) of the Act represents the first state statute to attempt this. Therefore, its constitutionality is inherently suspect.

The restrained reach of this Court's relevant precedents is not surprising in light of its historic imputation of pivotal significance to the defendant's legal responsibility *and concomitant power* to prevent the actual harm caused by the third party:

> [I]n cases decided after *Dotterweich,* the Courts of Appeals have recognized that those corporate agents vested with the responsibility, *and power commensurate with that responsibility,* to devise whatever measures are necessary to ensure compliance with the Act bear a responsible relationship to or have a responsible share in, violations. [emphasis added; citation omitted to representative federal appellate decisions marshalled in Footnote 14].
>
> *United States v. Park, supra,* 95 S. Ct. at 1911.

The maxim that vicarious criminal responsibility must be conditioned upon a realistic opportunity to exercise control over third party behavior also finds expression in lower court decisions such as *United States v. Georgetown University,* 331 F. Supp. 69 (D.D.C. 1971). In that case, the acts of defendant's own employee, which caused a water pollution incident, were deemed insufficient to sustain defendant's criminal conviction for an absolute liability federal offense because the employee was under the temporary, exclusive supervision of an independent contractor when the violation occurred. The United States Court of Appeals for the First Judicial Circuit cited this well reasoned opinion with favor in *United States v. White Fuel Corporation,* 408 F.2d 619, 624 (1st Cir. 1974).

Petitioner submits that the plain meaning of Section 610(8)(i) of the Act requires no link between a defendant and the "person", for whose conduct that defendant may be called to account, other than participation by both in the chain of custody of the same waste. There need be no "responsible relationship" between defendant and criminal actor. In fact, the Act's vicarious penal provision does not require that defendant and actor have actually dealt with or have known one another. Were Petitioner to have consigned waste to a hauler who, in turn, delivered it to a treatment facility which then sent it to a Pennsylvania landfill of its own choosing, which ultimately managed that waste in violation of the Act, Petitioner could have been criminally charged under Section 610(8)(i) with the landfill's transgression. This hypothetical dramatizes the statutory irrelevance of a defendant's lack of knowledge of the identity of the perpetrator or the nature and onset of its illegal act(s).

In the instant case, Petitioner was unable to promptly mitigate the harm, and thereby reduce its exposure to substantial per diem fines under Section 606(b) of the Act, because it did not learn for seven days of the independent hauler's illegal dumping of the waste

at a remote location. That Section 610(8)(i) of the Act facilitates criminal convictions predicated upon conduct over which the accused may have no practical control and about which they may lack actual knowledge represents the crux of the constitutional issue presented by this case.

II

This Court should grant certiorari because the public policy issues raised by Pennsylvania's expansion of the ambit of vicarious criminal liability are of national scope.

This Court could reasonably choose to grant review of the aberrational appellate decision below solely because it represents a radical departure from established federal precedent which restricts the scope of vicarious criminal liability.[4] However, important public policy considerations also militate in favor of judicial scrutiny at the highest level of Pennsylvania's unique statute.

If Section 610(8)(i) of the Act is deemed to be constitutional, businesses that generate or handle solid waste in the normal course will be hesitant to operate in Pennsylvania (or any other state, for that matter, which adopts Pennsylvania's statutory model) for fear of being convicted of strict liability offenses on purely vicarious grounds. The interstate movement of waste materials, whether intended for reuse, recycling or ultimate disposal, will be impeded because the challenged provision of the Act supports the prosecution of out-of-state waste

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4. That decision also deviates markedly from the Supreme Court of Pennsylvania's pronouncement on the subject in *Commonwealth v. Koczwara*, 397 Pa. 575, 155 A.2d 825 (1959), which mirrors this Court's relevant holdings in its refusal to extend vicarious criminal liability to reach the conduct of parties other than a defendant's own employees or agents.

generators whose wastes are mishandled in Pennsylvania by others. In sum, the prospect of paying substantial fines or serving prison terms, based upon third party conduct that may not be preventable, could well prove an overwhelming deterrent to virtually all commercial activity within the jurisdiction by exposed enterprises.

Companies wishing to continue doing business in Pennsylvania or shipping their waste into or through the Commonwealth without assuming the risk will have but one rational alternative: to eschew the employment of waste management contractors in favor of maintaining unilateral control of their own wastes indefinitely. While this strategy might favor recycling and otherwise prove environmentally beneficial in the long run, its economic and regulatory feasibility on a large scale is questionable. Existing waste management and disposal contractors would face a shrinking market for their services. Most state environmental agencies would find themselves ill-equipped to independently regulate the activities of every generator of waste regardless of size. Furthermore, most generators would unquestionably lack the necessary technical expertise and tangible resources to manage their own wastes "from cradle to grave".

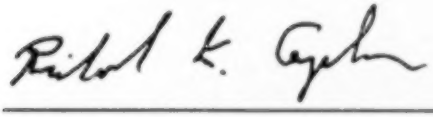
The ability of environmental prosecutors and the courts to mitigate the chilling economic impact of unbridled vicarious criminal enforcement, by making informed charging decisions based upon the facts and circumstances and by imposing fair sentences upon conviction, is also highly conjectural. Pennsylvania and other states with strict solid waste laws routinely assess the ethical integrity and compliance history of applicants as a precondition to the issuance or renewal of waste handling permits. One factor which plays a crucial role in such review is the criminal record of the entity and its key managers (with particular emphasis upon prior environmental infractions). *See, e.g.,* 35 P.S. 6018.503(c),(d) and (e)(i).

Given that state oversight agencies are frequently vested with broad discretion in such matters, it is conceivable that revocation or refusal to renew a waste permit could rest solely upon a vicarious conviction. If, for example, this were to occur in the instant case, it would effectively transform a misdemeanor conviction into a commercial "death sentence" because virtually all activity in the waste management industry is conducted by permit only. Furthermore, the loss of a permit in one jurisdiction may reasonably be relied upon by the environmental agencies of other jurisdictions as grounds for independent disciplinary action, resulting in a domino effect. The likelihood of a vicariously convicted enterprise surviving under such circumstances is slim.

CONCLUSION

In light of the profound public policy issues inherent in a fair reading of Section 610(8)(i) of the Act and the compelling constitutional question of first impression which is presented by this case, Petitioner believes that review of the decision below by the highest court of the land is warranted. Petitioner respectfully requests that its Petition for a writ of certiorari be granted.

CAPLAN & LUBER

By: 

RICHARD L. CAPLAN, ESQUIRE
Attorney for Petitioner,
Waste Conversion, Inc.

APPENDIX A

WASTE CONVERSION, INC.,	:	
	:	
Appellant	:	IN THE
	:	COMMONWEALTH
v.	:	COURT
	:	OF PENNSYLVANIA
COMMONWEALTH OF PENNSYLVANIA	:	
	:	
	:	No. 647 C.D. 1989
Appellee	:	

BEFORE: HONORABLE JAMES CRUMLISH, JR., President Judge

HONORABLE DAVID W. CRAIG, Judge

HONORABLE JOSEPH T. DOYLE, Judge

HONORABLE JAMES GARDNER COLINS, Judge

HONORABLE MADALINE PALLADINO, Judge

HONORABLE BERNARD L. McGINLEY, Judge

HONORABLE DORIS A. SMITH, Judge

ARGUED: November 15, 1989

OPINION BY JUDGE PALLADINO

FILED: January 8, 1990

Waste Conversion, Inc., (Appellant) appeals from an order of the Lycoming County Court of Common Pleas which denied Appellant's post-verdict motions and imposed a fine for Appellant's violation of section 610(8)(i) of the Solid Waste Management Act (Act).[1] We Affirm.

Appellant was convicted of violating the Act following a non-jury trial based upon stipulated facts. The pertinent facts are as follows. Appellant operates, a hazardous and residual waste treatment, storage and disposal facility in Montgomery County, Pennsylvania under a Department of Environmental Resources (DER) license. Appellant hired Wills Trucking Company of Ohio (Wills) to transport processed waste to disposal facilities. Appellant's employees loaded non-hazardous waste into a truck owned and driven by Al Cullenen (Driver) who was an independent hauler hired by Wills. Driver was to transport the waste to a disposal site in Michigan.

Appellant's employees loaded Driver's truck to 83,500 pounds.[2] Driver was traveling on Route 80 when he became aware that state police were operating a weigh station ahead. To avoid detection of the excessive weight, Driver re-routed the truck to a back road. Unable to negotiate the hill, Driver backed down the road to a more level position. While attempting to redistribute the load by raising the bed of the trailer, a substantial amount of waste slid out of the truck and onto the side of the road. With a lighter load, Driver was able to negotiate the hill.

After an investigation by the Toxic Waste Investigation and Prosecution Section of the Office of Attorney

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1. Section 610(8)(i) of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended,* 35 P.S. §6018.610(8)(i).

2. This is 3,500 pounds more than the allowable weight limit under Pennsylvania law.

General, the waste was traced to Appellant. Appellant, Driver and Wills were charged with violations of the Act. Only Appellant's case is before us.

Appellant filed a motion to quash the information and a petition to declare section 610(8)(i) of the Act unconstitutional. The trial court denied the motion and the petition. At a non-jury trial Appellant was found guilty of violating the Act. Appellant filed post-trial motions again questioning the constitutionality of section 610(8)(i) of the Act. These motions were denied. At sentencing, Appellant was fined $10,000. Appellant has filed this appeal.

Appellant raises the following issues: 1) whether the trial court erred in finding section 610(8)(i) of the Act constitutional; 2) whether the trial court's interpretation of the Act defeats the Act's purpose; and 3) whether the trial court erred in rejecting the "objective impossibility" defense.

I. CONSTITUTIONALITY

Section 610(8)(i) of the act provides in pertinent part as follows:

> It shall be unlawful for any person or municipality to:
>
> . . .
>
> (8) Consign, assign, sell, entrust, give or in any way transfer residual or hazardous waste which is at any time subsequently, by any such person or any other person;
>
> (i) dumped or deposited or discharged in any manner into the surface of the earth or underground or into the waters of the Commonwealth unless a permit for the dumping or depositing or discharging of such residual or hazardous waste has first been obtained from the department.

The criminal penalties section of the Act under which Appellant was convicted and sentenced, section 606, 35 P.S. §6018.606, states in pertinent part as follows:

> (b) Any person other than a municipal official exercising his official duties who violates any provision of this act, any rule or regulation of the department, any order of the department, or any term or condition of any permit, shall be guilty of a misdemeanor of the third degree and, upon conviction, shall be sentenced to pay a fine of not less than $1,000 but not more than $25,000 per day for each violation or to imprisonment for a period of not more than one year, or both.
>
> . . .
>
> (i) With respect to the offenses specified in subsections (a), (b), (c) and (f), it is the legislative purpose to impose absolute liability for such offenses. . . .
>
> (j) With respect to the offenses specified in subsections (a), (b), (c), (d), (e), (f) and (g), it is the legislative purpose to impose liability on corporations.

Appellant argues that Act could impose absolute liability on a defendant for acts extraordinarily remote in time and place from a defendant's contact with the actual perpetrator and therefore violates due process on its face. However, this is not the case before us. To engage in Appellant's analysis would require us to adjudicate the rights of parties not presently before the court at the insistence of a party who does not have standing to assert such rights. It is for this reason that facial attacks on the validity of statutes are not generally permitted. *Commonwealth v. Heinbaugh,* 467 Pa. 1, 354 A.2d 244 (1976). Therefore, we will confine this opinion to the facts before us.

Appellant argues the ultimate waste dumper was an independent contractor whose actions were beyond Appellant's control. Without the ability to control the Driver's conduct, Appellant argues that the Act violates Appellant's right to substantive due process.

In examining the constitutionality of a statute, there is a strong and fundamental presumption that the legislature has acted within constitutional bounds. *Commonwealth v. Parker White Metal Co.,* 512 Pa. 74, 515 A.2d 1358 (1986). One challenging the constitutionality of a legislative enactment bears a heavy burden of demonstrating that it clearly and palpably violates some specific mandate or prohibition of the constitution. *Commonwealth v. Milkulan,* 504 Pa. 244, 470 A.2d 1339 (1983).

Appellant relies upon *Commonwealth v. Koczwara,* 397 Pa. 575, 155 A.2d 825 (1959), *cert. denied,* 363 U.S. 848, (1960). In *Koczwara,* the supreme court vacated the jail sentence of a tavern operator who was held vicariously liable for the liquor code violations of an employee. However, the court upheld a $500 fine imposed upon the tavern owner despite his due process arguments. The court noted that the actual violations were committed without the personal knowledge, participation or presence of the defendant. Appellant relies upon the following court language "[o]ur own courts have stepped in time and again to protect a defendant from being held criminally responsible for acts about which he had no knowledge and over which he had little control." *id.* at 586, 155 A.2d at 830. Appellant asserts that this language requires that a defendant must have at least some degree of control over the actual perpetrator to be held vicarously liable for his action.

An examination of the Act reveals that Appellant can be deemed to have such control. A purpose of the Act is to implement the will of the people as expressed in Article I, section 27 of the Pennsylvania Constitution,

Commonwealth v. Parker White Metal Co., 512 Pa. 74, 515 A.2d 1358 (1986), which provides:

> Natural resources and the public estate. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The Act is a comprehensive scheme designed to protect the public from health and environmental hazards caused by inadequate solid waste practices. Appellant, as a corporation licensed to operate in this hazardous business, owes the highest duty of responsibility to insure that the citizens of this state are protected from the dangers necessarily a part of waste disposal. This was a principle reason for the legislature's imposition of strict vicarious liability. By undertaking the responsibility to dispose of waste, Appellant has assumed the duty to ensure that it is completed as required by the Act. Appellant cannot absolve itself of this reponsibility by transferring it to independent contractors and claiming that it has no control over them. We hold that, because Appellant has assumed responsibility in the waste disposal process, Appellant maintains control of the independent contractors it hires for the purpose of its waste disposal duties. Appellant's failure to maintain control cannot be used as a defense to avoid liability.

Appellant also relies upon *United States v. Georgetown University*, 331 F.Supp. 69 (DC Cir. 1971). In *Georgetown*, the University was prosecuted for violating Federal Environmental Laws when a University employee, while working with an independent contractor to test the University heating plant, caused a fuel oil discharge into the Potomac River. The court ruled that

the University lacked sufficient control over the facilities and mechanical apparatus to render it liable under the statute. The court held that the independent contractor had "borrowed" the University employee and therefore, because the employee was acting as an agent of the independent contractor, the University could not be held vicariously liable for the employees actions.

Appellant notes the following language from *Georgetown*:

> The Court is fully aware that the purpose of the relevant statutes in the case at bar is to minimize possible injuries to persons and property. Accordingly, specific intent to violate them is not required. The court believes that there can be no violation unless the defendant is in a position to prevent such damage. . . . When one is not in control of facilities which lead to a violation of statutes like those in the case at bar, the ultimate result or damage to persons or property should be examined in light of the congressional policy to impose strict liability upon only those corporations or individuals who have it peculiarly within their power through the exercise of due diligence to protect the public. To stretch the instant statutes to their logical extreme would be to allow the government to criminally indict even the most unrelated persons and business entities instead of the real perpetrator.

331 F.Supp. at 73. Appellant asserts that, as with the University, it had no control over the independent contractor who dumped the waste and therefore can not be held vicariously liable for violating the act.

Georgetown is not applicable in this case. First, the court stated "this decision is limited to the peculiar facts and circumstances of the instant case." *Id.* at 69-70. Further, unlike the University, Appellant is the focus of the regulatory scheme that imposes control over subsequent waste handlers in the disposal chain. Under this

analysis, we hold that Appellant had sufficient control over the method of disposing of the waste after it took possession to impose absolute vicarious liability.

Appellant next asserts that the $10,000 fine imposed is too high for absolute vicarious liability. Appellant, citing *Koczwara*, argues that only "light monetary fines" are permissible for vacarious liability under the doctrine of due process. In *Koczwara*, the court struck a jail sentence but upheld a $500 fine for vicarious liability of an individual tavern owner. Appellant argues that vicarious liability penalties are therefore limited to the $300 to $500 range.

Koczwara, was decided in 1959. The fine was levied upon an individual. Here, trial court levied a $10,000 fine upon a corporation consistent with the Act. Certainly, we cannot be locked into the $500 fine imposed in *Koczwara* for all time in all cases. Under the circumstances of this case, we hold that Appellant's fine does not clearly and palpably violate the due process clause.

Accordingly, we hold that, under the circumstances of this case, Appellant's right to due process was not violated by the Act.

II. LEGISLATIVE INTENT

Appellant next argues that the trial court's interpretation of the Act frustrates the legislative intent. Appellant argues that the purpose of the Act is to encourage private enterprise to undertake solid waste management. In support of this argument, Appellant relies upon section 102(11) of the Act, 35 P.S. §6018.102(11) which states in pertinent part as follows:

> (11) Utilize, wherever feasible, the capabilities of private enterprise in accomplishing the desired objectives of an effective comprehensive solid waste management program.

The policy of encouraging private enterprise to accomplish the objectives of the Act is consistent with

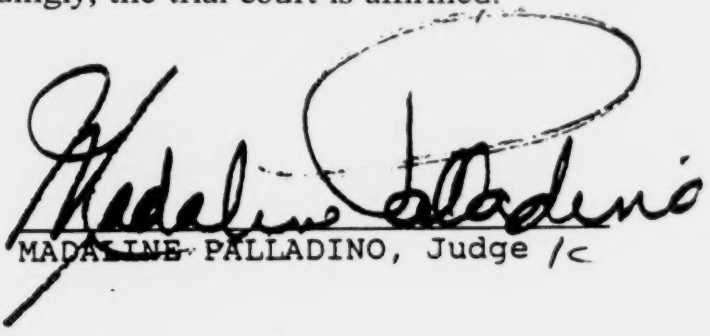
the imposition of absolute vicarious liability. We cannot assume that private enterprise will refuse to dispose of solid waste simply because it must take responsibility for accomplishing safe and clean disposal under the Act.

III. IMPOSSIBILITY DEFENSE

Finally, Appellant argues that the trial court erred in rejecting its "impossibility" defense. Appellant relies upon *United States v. Park*, 421 U.S. 658 (1975) for the proposition that strict criminal liability may only be imposed where potential defendants enjoyed a responsible relation to the situation. *Park* permitted corporate agents to escape criminal liability by demonstrating that they were powerless to prevent or correct the violation. Appellant argues that there is no evidence to show that it could have prevented the Driver from dumping the waste improperly.

As we stated above, once Appellant undertook the task of disposing of the waste, it had the obligation to see that the task was completed in compliance with the Act. The trial court did not err in rejecting the impossibility defense.

Accordingly, the trial court is affirmed.



Judge Colins dissents.

APPENDIX B

IN THE COURT OF COMMON PLEAS
OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
v. :
NO. 87-11,202
WASTE CONVERSION, INC. :

OPINION AND ORDER

Defendant Waste Conversion, Inc. (WCI) has filed a motion to quash the information and a petition to declare Section 610(8)(i) of Pennsylvania's Solid Waste Management Act unconstitutional. The defendant, a corporation, has been charged with violating the above mentioned section on September 14, 1987. It is contended by the Commonwealth that on that date, defendant's employees loaded with barrels of residual waste a truck leased to Wills Trucking Company of Richfield, Ohio, and driven by the truck's owner, Al Cullenen. Cullenen was to transport the material, originally generated by the Marine Air Station at Camp Lejeune, North Carolina, from WCI's processing facility to a disposal site in Dearborn, Michigan.

Defendant's employees loaded and weighed Cullenen's truck. The weight ticket showed that the load weighed 83,500 pounds, 3,500 pounds over the maximum gross weight for this type of vehicle traveling on a highway in Pennsylvania.

While traveling on Interstate 80, Cullenen realized: (presumably through CB transmissions) that the Pennsylvania State Police were operating a weigh station. To avoid the station, Cullenen rerouted his truck onto Route 44. The alternate Route crosses a mountain which Cullenen's truck was unable to negotiate.

After discovering that he could not reach the top of the mountain, Cullenen backed down to a more level

span of highway to redistribute his load. Debris sticking through the tailgate prevented him from closing it, and he backed onto the shoulder of the road and raised the trailer bed to shift the debris away from the tailgate. As he did so, the majority of the load slid out of the back of the truck and onto the ground. He was still unable to shut the tailgate, but was able to climb the mountain since his load was considerably lighter. Cullenen completed his trip to Michigan but failed to advise the authorities of the dumping incident.

Approximately one week later, the Department of Environmental Resources and agents of the Office of the Attorney General's Bureau of Criminal Investigations inspected the dumping site. It was learned that the material had been processed at defendant's plant. Thereafter, the Attorney General's Office brought charges against Waste Conversion, Inc., Wills Trucking, and Al Cullenen. We are concerned here with only the potential criminal liability of the first of those parties.

Section 610(8)(i) of the Solid Waste Management Act, under which defendant is charged, reads in pertinent part as follows:

> "It shall be unlawful for an person or municipality to:
>
> (8) consign, assign, sell, entrust, give or in any way transfer residual or hazardous waste which is at anytime subsequently, by any such person or any other person;
>
> (i) dumped or deposited or discharged in any manner into the surface of the earth . . . unless a permit for the dumping or depositing or discharging of such residual or hazardous waste has first been obtained from the Department (of Environmental Resources)." 35 Pa. C.S.A. §6018.610(8)(i).

The Act also provides for criminal penalties for violation of the above quoted section. The penalty relevant to this case is contained in 35 Pa. C.S.A. §6018.606(c), which reads in pertinent part:

> "Any person . . . who violates any provision of this Act . . . shall be guilty of a misdemeanor of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2,500.00 nor more than $50,000.00 for each violation or to imprisonment for a period of not more than two years, or both."

"Person" is defined to include corporations. A reading of Section 610(8)(i) of the Act would therefore project a legislative intent to hold criminally liable any corporation which consigns or entrusts residual waste which is later dumped or deposited on the earth without a permit by the person to which it is consigned or by any other person. In other words, there is a clear legislative intent to impose absolute liability for violations of the Act.

Defendant argues that the imposition of such absolute liability without regard to some degree of criminal culpability is inconsistent with the principles of due process. The Pennsylvania Supreme Court has held however, that criminal liability and the imposition of a fine can be imposed in some circumstances without a showing of criminal culpability and without offending constitutional limitations of fairness.

In *Commonwealth v. Koczwara,* 397 Pa. 575, 155 A.2d 825, (1959), the Pennsylvania Supreme Court upheld a fine but struck down a sentence of imprisonment as inconsistent with Section 9, Art. I of the Pennsylvania Constitution. In the *Koczwara* case the defendant, a liquor licensee, had been charged with several violations of the Liquor Code. The charge was based on vicarious liability on the part of the licensee for the act of his employee. He was sentenced to a three

month jail term and a $500 fine under the repeat offense section of the Liquor Code. In upholding the fine, the Court said:

> "Were this the defendant's first violation of the Code, and the penalty solely a minor fine of from $100 to $300, we would have no hesitation in upholding such a judgment. Defendant, by accepting a liquor license, must bear this financial risk. Because of a prior conviction for violations of the Code, however, the trial judge felt compelled under this mandatory language of the statute, §494(a), to impose not only an increased fine of $500, but also a three month sentence of imprisonment. Such sentence of imprisonment in a case where liability is imposed vicariously cannot be sanctioned by this Court consistently with the law of the land clause of §9, Art. I of the Constitution of the Commonwealth of Pennsylvania." Id. at 830.

Further, the court stated that:

> "We found no case in any jurisdiction which has permitted a *prison term* for a vicarious offense. . . . In holding that the punishment of imprisonment deprives the defendant of due process of law under these facts, we are not declaring that *Koczwara* must be treated as a first offender under the Code. He has clearly violated the law for a second time and must be punished accordingly. Therefore, we are only holding that so much of the judgment as calls for imprisonment is invalid, and we are leaving in tact the $500 fine imposed . . . under the subsequent offense section."

Based on the Court's reasoning in *Koczwara,* it is clear that an employer may be found vicariously guilty of certain offenses committed by an employee, and the fines set forth in 35 Pa. C.S.A. §6018.606(c) would not violate the employer's due process rights.

A corporation, as a fictitious entity rather than a natural person, cannot be punished by incarceration. *Commonwealth v. McIlwain School Bus Lines, Inc.*, 423 A.2d 413 Pa. Super (1980). Because the defendant here is a corporation and the officers and directors of that corporation have not individually been charged, incarceration would not be a possible outcome of this case. Accordingly, there is no possibility of a penalty being imposed which would offend the holding of the Pennsylvania Supreme Court in *Koczwara*.

The defendant argues however that, because the Act (35 Pa. C.S.A. §6018.103) defines "person" to include the officers and directors of a corporation, the officers and directors of Waste Conversion, Inc. could be charged and if charged, could, on the face of the statute, be vulnerable to a punishment of incarceration for a violation of §610(8)(i). The imposition of any such penalty would offend the *Koczwara* holding as violating due process concepts. Accordingly, defendant argues that the Act must be stricken.

The set of facts postulated by the defendant is not before the Court. Were the officers or directors of Waste Conversion, Inc. individually charged with the violation in question, we have no doubt that the *Koczwara* holding would require that any potential penalty imposed upon them would be limited to fines. This particular argument of defendant is rejected as not being presented by the facts of the case but were it presented in this case, we state by way of dictum that the statute could be salvaged by limiting the sentence to a fine.

The defendant next argues that this case can be distinguished from the *Koczwara* case in that the party causing the dumping was an independent contractor not in the employ of the defendant Waste Conversion, Inc. In *Koczwara* absolute liability had been imposed upon the liquor licensee by reason of the conduct of his own employee in violating the Liquor Code. Defendant relies

upon *United States vs. Georgetown University*, 331 F.Supp. 69 (D.C. D.C. 1971).

Georgetown University was prosecuted for violating a federal environmental statute by discharging fuel oil into a river. An independent contractor who was responsible for testing the oil system of the University's new heating and cooling plant instructed a University employee to leave the oil pumps running thereby causing the discharge. The District Court ruled that the University lacked "sufficient control over the facilities and mechanical apparatus, so as to make them criminally liable under the aforementioned statute." Id. at 70. Because the independent contractor had "borrowed" the University employee, the employee was acting as an agent of the independent contractor and the University could not be held vicariously liable for the employee's actions. The Court ruled that to impose vicarious liability on someone not in control of facilities which lead to a statutory violation, would lead to the absurd result of implicating unrelated individuals and business entities rather than the real purpetrator. Id. at 73.

Defendant here analogizes the facts of the present case to those in *Georgetown*. The defendant lost control of the disposal operation when it hired the independent contractor to haul the residual waste and entrusted the substance to him. To permit a criminal action against defendant would also, defendant argues, permit the Commonwealth to prosecute the United States Marine Corps as the originator of the waste which dumped from Cullenen's truck.

In considering whether the *Georgetown* case is controlling here, we must consider the type of legislation involved and the competing constitutional interests which are affected by it.

Public welfare statutes such as the Solid Waste Management Act are enacted pursuant to the police power of the state, the broadcast and most flexible of all state government powers. In exercising its police power,

the legislature may regulate certain industries, services and other activities which affect public health, safety and welfare. Such regulations inevitably involve difficult issues concerning the balancing of individual interests against those of the general public. *Morissette vs. United States*, 342 U.S. 246, 253-54 (1952). Based on the reasoning in *Morissette*, we must remember that not only are we considering the rights of Waste Conversion, Inc., but the rights of all the citizens of Pennsylvania as well. Indeed, one of the purposes of the Solid Waste Management Act as set forth in 35 Pa. C.S.A. §6018.102(10) is to implement Article I, Section 27 of the Pennsylvania Constitution:

> "*Natural resources and the public estate.* The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and asthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people."

While the *Georgetown University* case involved a federal environmental statute which addressed some of the same environmental concerns addressed by the Pennsylvania Solid Waste Management Act, the defendant, Georgetown University was a private institution which was not a target of the heavy regulation involved in the statute. Waste Conversion, on the other hand (and unlike the United States Marine Corps facility, we might add), is part of a heavily regulated waste disposal industry. Had Waste Conversion chosen to transport the residual waste in question with its own trucks and its own employees, the *Koczwara* decision would clearly hold that the Company could be held vicariously liable in a criminal proceeding for the act of its employee in dumping the waste as allegedly occurred in this case.

This liability would stand irrespective of the fact that the company may have exercised consummate care in the selection of its employees, the use of its equipment, the method of loading the truck, training of its employees, etc. The issue presented is whether the legislature can prevent the company from avoiding that potential accountability through the device of using independent contractors to haul the residual waste.

The legislature, in devising its scheme for the handling of hazardous and residual waste could fairly consider the following: (a) the imperative of fixing responsibility for the proper disposal of such wastes; (b) the difficulties which can be encountered in assessing individual responsibility when action is taken by a corporation; and (c) the ease with which corporate employees could "wash their hands" of the often frustrating and expensive burden of lawfully disposing of these wastes by consigning them to contractors who may be willing to provide attractive rates but little responsibility.

Given the critical threat to the health and welfare of the general public represented by the unlawful dumping of hazardous and residual waste, and indeed the constitutional right of citizens of this Commonwealth to the preservation of the quality of their environment, we hold that it does not violate the fundamental fairness mandate of the due process clause for a corporation engaged in the waste processing business to be held vicariously liable for the act of an independent contractor-hauler who illegally dumps residual waste, to the same extent that the corporation can be held vicariously liable for the same illegal act by its own employees.

Given the above holding, we enter the following Order.

ORDER

AND NOW, this 21st day of June, 1988, for the reasons set forth in the foregoing discussion, it is ORDERED and DIRECTED that the defendant's motions to quash the information and to declare §610(8)(i) of the Pennsylvania Solid Waste Management Act unconstitutional are DENIED.

By The Court,

Thomas C. Raup, P.J.

cc: Richard Caplan, Esq.
Gregory Abeln, Esq.
Court Administrator
Honorable T.C. Raup
Honorable Clinton W. Smith
Law Clerk (2)
Gary L. Weber, Esq.

APPENDIX C

IN THE COURT OF COMMON PLEAS
OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
v.	:	
WASTE CONVERSION, INC.	:	NO. 87-11,202

OPINION AND ORDER

This case was tried non jury on July 20, 1988.

Defendant Waste Conversion, Inc. (WCI) was charged with violating §610(8)(i) of the Pennsylvania Solid Waste Management Act, 35 Pa. C.S.A. §6018(8)(i), on September 14, 1987. On that date defendant's employees loaded barrels of residual waste onto a truck leased to Wills Trucking Company of Richfield, Ohio and driven by the truck's owner, Al Cullenen. Cullenen was to transport the material, originally generated by the Marine Air Station at Camp Lejeune, North Carolina, from WCI's processing facility to a disposal site in Dearborn, Michigan.

Defendant's employees loaded and weighed Cullenen's truck. The weight ticket showed that the load weighed 83,500 pounds, 3,500 pounds over the maximum gross weight for this type vehicle traveling on Pennsylvania's highways.

While traveling on Interstate 80, Cullenen realized (presumably through CB transmissions) that the Pennsylvania State Police were operating a weigh station. To avoid the station, Cullenen rerouted his truck onto Route 44. The alternate route crosses a mountain which Cullenen's truck was unable to negotiate.

After discovering that he could not reach the top of the mountain, Cullenen backed down to a more level span of highway to redistribute his load. Debris sticking through the tailgate prevented him from closing it, and

he backed onto the shoulder of the road and raised the trailer bed to shift the debris away from the tailgate. As he did so, the majority of the load slid out of the back of the truck and onto the ground. He was still unable to shut the tailgate, but was able to climb the mountain since his load was considerably lighter. Cullenen completed his trip to Michigan, but failed to advise the authorities of the dumping incident.

Approximately one week later, the Department of Environmental Resources and agents of the Office of the Attorney General's Bureau of Criminal Investigations inspected the dumping site. It was learned that the material had been processed at WCI's plant. Thereafter, the Attorney General's Office brought charges against Waste Conversion, Inc., Wills Trucking, and Al Cullenen. Waste Conversion filed a motion to quash the information and a petition to declare §610(8)(i) of the Act unconstitutional. We denied defendant's motions by opinion and order dated June 21, 1988.

The parties agreed to a non jury trial of the case, to be conducted by conference call; the Attorney General's Office doing so by Gregory Abeln, Esquire, and WCI through its Vice President of operations, Randy R. Royer and its counsel of record, Richard L. Caplan, Esquire. The Court approved of conducting the trial in this manner since the issues to be determined involved no factual determinations, and because the potential sentence for this corporate defendant would be limited to a fine. The parties submited a stipulation as to the names of the Commonwealth's witnesses and the substance of their testimony, and stipulted to the admission of exhibits which had been provided to the Court.

During the course of the trial, WCI and the Commonwealth agreed to add two elements to the stipulation. They agreed that there exist no statements given by any of the Commonwealth's witnesses and no records which suggest that WCI knew in advance that Cullenen would illegally dispose of the waste; therefore, there was

no collusion to dispose of the waste illegally. Further, the parties agreed that at no time when Cullenen was in contact with WCI employees did he indicate that his truck might be incapable of managing its load. By way of explanation, counsel for the defendant stated that when Cullenen traveled on Interstate 80, the truck could handle the weight, even though it was overloaded.

At the conclusion of the evidence, WCI renewed its petition to have §610(8)(i) of the Solid Waste Management Act declared unconstitutional. In addition to its previous argument that the imposition of absolute liability without regard to some degree of criminal culpability is inconsistent with the principles of due process, WCI contends that one charged with an absolute liability offense may raise as a defense impossibility to prevent or correct the violation. In raising the impossibility defense, WCI relies on *United States v. Park*, 421 U.S. 658, 95 S.Ct. 1903 (1975).

The *Park* case involved the assertion of criminal liability against a managerial employee of Acme Markets, Inc. with respect to a violation of the Federal Food, Drug and Cosmetic Act. While affirming the conviction in the Park case, the United States Supreme Court did make the following analysis:

> "The Act does not, as we observed in Dotterweich, make criminal liability turn on 'awareness of some wrongdoing' or 'conscious fraud'. The duty imposed by Congress on responsible corporate agents is, we emphasize, one that requires the highest standard of foresight and vigilance, but the Act, in its criminal aspect, does not require that which is objectively impossible. The theory upon which responsible corporate agents are held criminally accountable for 'causing' violations of the Act permits a claim; that a defendant was 'powerless' to prevent or correct the violation . . . If such a claim is made, the defendant

> has the burden of coming forward with the evidence, but this does not alter the Government's ultimate burden of proving beyond a reasonable doubt the defendant's guilt, including his power, in light of the duty imposed by the Act, to prevent or correct the prohibited condition . . ." Id. at 1912 (underlining added).

Where a strict liability statute is involved, a managerial employee of a corporation clearly has the right to assert the impossibility defense. We are not convinced, however, that the defense is available to the corporation itself. The potential consequences to a corporation of a conviction of a criminal charge do not include incarceration, but rather are limited to the imposition of fines. See e.g., *Commonwealth v. Koczwara,* 397 Pa. 575, 155 A.2d 825 (1959). Accordingly, the Courts have allowed the imposition of absolute criminal liability on a corporation under circumstances where an individual could not be convicted. Id. at 830.

The mere fact that the individual who is the direct cause of the dumping or depositing of the residual waste was an independent contractor does not constitute a defense to Waste Conversion, Inc. As we stated in our opinion of June 21, 1988:

> "The legislature, in devising its scheme for the handling of hazardous and residual waste, could fairly consider the following:
>
> (a) The imperative of fixing responsibility for the proper disposal of such waste;
>
> (b) The difficulties which can be encountered in assessing individual responsibility when action is taken by a corporation; and
>
> (c) The ease with which corporate employees could 'wash their hands' of the often frustrating and expensive burden of lawfully disposing of these

wastes by consigning them to contractors who may be willing to provide attractive rates but little responsibility.

Given the critical threat to the health and welfare of the general public represented by the unlawful dumping of hazardous and residual waste, and indeed the constitutional right of the citizens of this Commonwealth to the preservation of the quality of their environment, we hold that it does not violate the fundamental fairness mandate of the due process clause for a corporation engaged in the waste processing business to be held vicariously liable for the act of an independent contractor-hauler who illegally dumps residual waste, to the same extent that the corporation can be held vicariously liable for the same illegal act by its own employees."

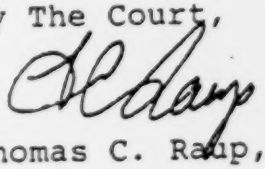
Were impossibility a defense in this case, the Court would nevertheless hold that the defendant corporation has been shown beyond a reasonable doubt to have had the ability to prevent the violation complained of in this case. WCI, through its employees, loaded the truck in question. The quantity of waste exceeded by 3500 pounds the maximum gross weight for this type of vehicle. The driver, learning that the Pennsylvania State Police were actively enforcing the weight restrictions on Route 80, attempted to circumvent the State Police location by driving over a steep mountain road. As a direct consequence, the spill occurred. While WCI could not have foreseen the specific sequence of events which ensued from the overloading of the truck in this case, it was chargeable with knowledge that the weight restrictions are based upon both safety and highway maintenance considerations; and that extreme care must be exercised in the transportation of hazardous or residual waste.

Given the above discussion, we enter the following Order.

VERDICT

AND NOW, this 10th day of October, 1988, for the reasons set forth in the foregoing discussion, the Court finds that the defendant Waste Conversion, Inc. is guilty of having violated §610(8)(i) of the Pennsylvania Solid Waste Management Act, as alleged. The defendant is to be scheduled for sentencing on the next available sentencing date.

By The Court,



Thomas C. Raup, P.J.

cc: Gregory B. Abeln, Esq.
Richard L. Caplan, Esq.
Court Administrator
Honorable Thomas C. Raup
Honorable Clinton W. Smith
Honorable Kenneth D. Brown
Law Clerk (2)
Gary L. Weber, Esq.

APPENDIX D

IN THE COURT OF COMMON PLEAS
OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
vs.	:	
WASTE CONVERSION, INC.	:	NO. 87-11,202

ORDER

AND NOW, this 21st day of December, 1988, upon consideration of the defendant's Post Verdict Motion, it is ORDERED and DIRECTED as follows:

The constitutional issues raised in the post verdict motion have been addressed by the Court in its opinion and order dated October 10, 1988 and are denied for the reasons set forth in that opinion.

The arguments which are based upon the facts presented in the stipluation of facts and the supplemental stipulation of facts are denied. A review of the stipulation of facts which was filed under letter of July 18, 1988 and confirmed and supplemented at the non jury trial of July 20, 1988 supports the recitation of facts contained in the opinion and order of this Court of October 10, 1988; specifically, it is clear from the stipulation that Waste Conversion loaded the truck to a weight which it knew or should have known exceeded the limit.

Based upon the foregoing reasons, the defendant's post verdict motion in the nature of a Motion in Arrest of Judgment is Denied. Sentence is to be scheduled forthwith.

By The Court,

Thomas C. Raup, P.J.

cc: Gregory Abeln, Esq.
Richard Caplin, Esq.
Court Administrator
Honorable Thomas C. Raup
Suite 1550, One Penn Center
1617 JFK Blvd.
Phila. 19103

APPENDIX E

IN THE COURT OF COMMON PLEAS
OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. 87-11,202
vs.	:	
WASTE CONVERSION, INC.	:	Sentence

ORDER

NOW, January 5, 1989, sentence of the Court is that the Defendant Corporation pay the costs of prosecution and pay a fine in the amount of $10,000. The costs and fine are to be paid to the Cost Clerk of Lycoming County. The Cost Clerk is DIRECTED to forward the fine to the Attorney General's Office, attention of Greg Abeln, for payment into the Solid Waste Abatement Fund.

The payment of the fine and costs is deferred pending passage of the thirty days for filing a notice of appeal. If a notice of appeal is filed, the payments will be deferred pending the final outcome of the appeal.

By The Court,

T.C. Raup, P.J.

cc: Court Administrator
Cost Clerak
Gregory Abeln, Esq.
Deputy Attorney General
15th Floor
Strawberry Square
Harrisburg, PA. 17120

Michael Harrington, Esq.
Richard Caplan, Esq.
Suite 1500
One Penn Center
1617 JFK Blvd.
Philadelphia, PA 19103

APPENDIX F

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

COMMONWEALTH OF PENNSYLVANIA	)	
v.	)	No. 95 Harrisburg 1989
WASTE CONVERSION, INC.	)	

ORDER OF COURT

AND NOW, to-wit, this 30th day of March, 1989, the above-captioned appeal is transferred *sua sponte* to Commonwealth Court. 42 Pc.C.S. §762(a)(2).

By The Court;

Brosky, J.

A TRUE AND CORRECT COPY
ATTEST: 03/30/89

Mildred E. Hillerman
DEPUTY PROTHONOTARY

APPENDIX G

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 647 C.D. 1989

WASTE CONVERSION, INC.,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA

ORDER

The Motion of the Pennsylvania Chamber of Business and Industry to participate in this appeal as amicus curiae is hereby granted, and it is further ordered that the said brief must be filed on or before Friday, May 26, 1989.

DATED: May 15, 1989

BY THE COURT:

Paul S. Lehman

S.J.

CERTIFIED FROM THE REPORT
AND ORDER EXIT
MAY 15, 1989

C.L. Stoltz

Deputy Prothonotary – Chief Clerk

APPENDIX H

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MILDRED E. WILLIAMSON
DEPUTY PROTHONOTARY

434 Main Capitol Building
P.O. Box 624
Harrisburg, Pennsylvania 17108
(717) 787-6181

July 3, 1990

Richard L. Caplan, Esq.
Suite 1550
1617 J.F.K. Boulevard
Philadelphia, PA 19103

Re: Commonwealth v. Waste Conversion, Inc., Petitioner
No. 28 M.D. Allocatur Docket 1990

Dear Mr. Caplan:

This is to advise that the following Order has been entered for the Petition for Allowance of Appeal filed for the above-captioned matter.

"July 2, 1990, Petition Denied
Per Curiam"

Sincerely yours,

Mildred E. Williamson,
Deputy Prothonotary

MEW/spb
CC: Hon. Madaline Palladino
Hon. Thomas C. Raup
Roseann B. Termini, Esq.
Chief Clerk – Commonwealth Court

(No. 647 C.D. 1989)
Prothonotary's Office
Lycoming Co. – No. 87-11,202

APPENDIX I

WASTE CONVERSION, INC.,	:	
	:	
Appellant	:	IN THE
	:	COMMONWEALTH
v.	:	COURT OF
	:	PENNSYLVANIA
COMMONWEALTH OF	:	
PENNSYLVANIA	:	NO. 647 C.D. 1989
	:	
Appellee	:	

ORDER

AND NOW, Janaury 8, 1990, the order of the Lycoming County Court of Common pleas in the above captioned matter is affirmed.

MADALINE PALLADINO, Judge

CERTIFIED FROM THE RECORD
JAN. 8, 1990

Deputy Prothonotary – Chief Clerk

Supreme Court, U.S.
FILED
SEP 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-299

In The
Supreme Court Of The United States
October Term, 1990

Waste Conversion, Inc.,
Petitioner

v.

Commonwealth of Pennsylvania,
Respondent

On Petition For Writ of Certiorari
To The Commonwealth Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

Ernest D. Preate, Jr.
Attorney General

Anthony Sarcione
Executive Deputy Attorney General
Director, Criminal Law Division

Robert A. Graci
Chief Deputy Attorney General
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QUESTION PRESENTED

Whether section 610(8)(i) of the Solid Waste Management Act of Pennsylvania, which authorizes the imposition of a fine upon a waste treatment facility for the illegal dumping of waste from that facility by a waste hauler hired by the facility, violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

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NO. 90-299

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

WASTE CONVERSION, INC.,
Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COMMONWEALTH COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Commonwealth of Pennsylvania, (hereinafter "the Commonwealth") respectfully requests that this Court deny the petition for writ of certiorari. The opinion of the Commonwealth Court of Pennsylvania is reported at ___ Pa.Commw. _____, 568 A.2d 738 (1990). (Pet. App. A, A1-A9).

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania declines to proceed on the basis of petitioner's statement of the case. Accordingly, respondent incorporates by reference the statement of facts in the opinion by the Commonwealth Court of Pennsylvania. That opinion is reported at ___ Pa.Commw. _____, 568 A.2d 738 (1990). (Pet. App. A, A1-A9). Contrary to petitioner's assertion, this case was not transferred sua sponte because the constitutionality of a state statute appeared to be in issue. Rather, the Superior Court of Pennsylvania properly transferred this case since the Commonwealth Court of Pennsylvania has exclusive jurisdiction of all criminal actions or proceedings for the violation of any regulatory statute administered by any Commonwealth agency. 42 Pa.C.S.

§ 762(a)(2). (Opp. Brief App. A1).

Petitioner also asserts oral argument before the Commonwealth Court was abbreviated. The Commonwealth Court of Pennsylvania conducted oral argument in accordance with the Pennsylvania Rules of Appellate Procedure, Chapter 23, Sessions and Argument. Pa. R.A.P. 2315 (Opp. Brief App. A2).

Finally, although conceding that the truck was loaded in excess of 80,000 pounds, petitioner claims that legal responsibility for operating an overweight vehicle rests solely with the vehicle's owner/operator under the Pennsylvania Motor Vehicle Code 75 P.S. [sic] § 4901(a). (Pet. at 4,n.1) This case does not concern infractions of the Pennsylvania Motor Vehicle Code. Petitioner was not charged with a violation of the Pennsylvania Motor Vehicle Code.

Moreover, petitioner is not blameless for the incident of overloading the vehicle. Petitioner's own employees loaded the driver's truck to 83,500 pounds; that is 3,500 pounds greater than the allowable weight limit under Pennsylvania law. (Pet. App. A, A-2)

REASONS FOR DENYING THE WRIT

The decision of the Commonwealth Court of Pennsylvania is an uneventful application of the Solid Waste Management Act of Pennsylvania to the facts of this case in accordance with due process principles.

Petitioner suggests that Pennsylvania decided an important constitutional question. Respondent submits that this case does not present a constitutional question of any substance. Moreover, petitioner fails to support his contention that the decision is repugnant to the United States Constitution. See 28 U.S.C. § 1257(a).

The Pennsylvania State courts properly applied and followed settled principles of law in resolving petitioner's claim concerning the constitutionality of section 610(8)(i) of the Solid Waste Management Act of Pennsylvania (hereinafter "Act"). This Court should not

grant review merely to reexamine the validity of a state statute in the absence of any conflict with federal law.

Petitioner claims that section 610(8)(i) of the Act, 35 P.S. § 6018.610(8)(i) violates due process because of the imposition of criminal liability on a corporate defendant for the criminal acts of an "independent" contractor. This simply is not the type of issue that justifies review by this Court. The state courts of Pennsylvania properly framed the question flowing from such a claim in light of this Court's precedent and then applied the same precedent in resolving petitioner's claim. The decision of the Commonwealth Court of Pennsylvania does not conflict with any federal precedent. Under the specific circumstances of this case, the imposition of a fine against a corporation does not violate due process.

Nothing about this case requires review by this Court.

Petitioner concedes that the Act is a public welfare statute. The Act, enacted for the general benefit and welfare of the public, contains punitive absolute liability provisions. This reflects a recognition by our state lawmakers that unregulated activity in a highly sophisticated and complex society may cause widespread harm to an innocent citizenry irrespective of an actor's state of mind. Morissette v. United States, 342 U.S. 246 (1952). The Morissette Court, in construing public welfare offense statutes, held that "the guilty act alone makes out the crime." Id. at 256.

Recently, in Liparota v. United States, 471 U.S. 419 (1985), this Court reiterated its recognition of public

welfare offenses. This Court, in Liparota, articulated that "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." Id. at 433. Clearly, petitioner, which holds a permit to engage in the environmental business in Pennsylvania, had notice of the provisions of the Act which prohibited its conduct. Here, petitioner, who chose to operate in the waste management business, owes the highest duty of responsibility concerning the proper disposal of waste. Furthermore, this Court set forth that where obnoxious waste materials are involved, the probability of regulation is so great that anyone who deals with them must be presumed to be aware of the regulations.

United States v. International Minerals and Chemical Corp., 402 U.S. 558, 565 (1971).

Petitioner urges this Court to review this case based on hypothetical conduct that the statutory language could arguably embrace. This Court has settled that facial attaches on the validity of statutes are generally not permitted. United States v. Powell, 423 U.S. 87 (1975); United States v. Mazurie, 419 U.S. 544 (1975).

This casc turns solely upon an analysis of the particular facts. The Commonwealth Court of Pennsylvania correctly adjudicated petitioner's claims by examining the specific conduct engaged in by petitioner. Petitioner, a corporation, through its employees, took part in the illegal activity in contravention of the Act by overloading

the waste hauler's truck. The vehicle departed from petitioner's premises in an overloaded condition.Clearly, these practices and procedures by petitioner, a regulated enterprise, inadequately protected the public. The blameworthiness depends not only on the commission of a crime but on the overall reasonableness of corporate practices in opposition to regulatory statutes.

The Commonwealth Court and Common Pleas Court of Pennsylvania found that the Act is a comprehensive scheme designed to protect the public from health hazards resulting from inadequate waste disposal practices. The Commonwealth Court specifically found that a major reason for the legislature's imposition of strict liability was to insure that the people of this Commonwealth are pro-

tected from the dangers associated with waste disposal. (Pet. App., A-6). Certiorari should not be granted to reconsider the validity of the Act based on a mere allegation of a due process violation.

Petitioner asserts that the Pennsylvania state courts failed to consider the chilling effect imposition of liability would have on business activity. This is not a proper reason upon which to grant the petition. The Act applies to anyone in the waste management chain from the time of generation if it occurs in Pennsylvania throughout its handling within Pennsylvania. The Act is a "cradle to grave" regulatory scheme providing public protection against the dangers of improper waste disposal. In interpreting and applying it, the Commonwealth Court adhered to settled prin-

ciples germane to public welfare offense statutes. (Pet. App., A8-A9).

Petitioner asserts this Court could grant review because the Commonwealth Court opinion represents a radical departure from established federal precedent. (Pet. at 12) Petitioner cites no authority for this proposition.

It is well established that criminal sanctions attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are construed to effectuate their regulatory purposes. See e.g. United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3rd Cir. 1984), cert. denied, Angel v. United States, 469 U.S. 1208 (1985) (unlawful disposal of hazardous waste under the Federal Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992(k); criminal pro-

vision not limited to owners and operators of waste facilities), citing, United States v. Park, 421 U.S. 658, 672-673 (1975); Smith v. California, 361 U.S. 147, 152 (1959); and United States v. Dotterweich, 320 U.S. 277, 280-81 (1943); United States v. Balint, 258 U.S. 250, 251-52 (1922). The court of appeals in Johnson & Towers, enunciated that limiting the class of potential defendants to owners and operators of waste facilities undercuts the purpose of the environmental legislation. Id. at 667. Contrary to petitioner's assertion, the Commonwealth Court of Pennsylvania applied settled principles of law.

Petitioner further asserts that this decision deviates markedly from the Pennsylvania Supreme Court decision of

Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959). Unequivocally, this is not a valid rationale for this Court to grant review. If the intermediary appellate court failed to follow Pennsylvania precedent, this is a question of state law.[1] Furthermore, contrary to this claim, both the Commonwealth Court and the Common Pleas Courts of Pennsylvania adhered to the principle set forth in Commonwealth v. Koczwara, 397 Pa. 595, 155 A.2d 825 (1959) concerning the imposition of only a fine when an individual is vicariously liable. Petitioner was not charged as an individual but rather as a corporate defendant.

---

[1]The Supreme Court of Pennsylvania had the opportunity to review petitioner's claim of a due process violation and declined to do so.

Petitioner claims another reason for this Court to grant review is because of the asserted availability of the impossibility defense. That the Commonwealth Court of Pennsylvania declined to allow this defense based on the facts of the case is not an adequate basis for this Court to hear this case. Petitioner relies on United States v. Park, 421 U.S. 685 (1975), United States v. Wisenfeld Warehouse Co., 376 U.S. 86 (1964) and United States v. Dotterweich, 320 U.S. 277 (1943). These cases are easily distinguishable. Here, the officers of petitioner corporation were not charged.

More importantly, the decision of the Commonwealth Court of Pennsylvania does not conflict with these cases or any other federal decisions. The defense of impossibility asserted in those cases specifically pertained to viola-

tions under the Federal Food, Drug and Cosmetic Act and has rarely been satisfied. 21 U.S.C. § 301 et seq. See e.g., United States v. Y. Hata and Co., 535 F.2d 508, 511-12 (9th Cir.); cert. denied, 429 U.S. 828 (1976); United States v. Starr, 535 F.2d 512, 515-516 (9th Cir. 1976).

The Commonwealth Court of Pennsylvania recognized that Park permitted the affirmative defense of impossibility by an individual defendant thereby avoiding liability if it could be demonstrated that he was powerless to prevent the violation. (Pet. App. A-9)

In addition to not involving an individual defendant, petitioner, a corporation, was far from powerless to prevent the dumping. Petitioner had every opportunity to control in the choice of a waste transporter. The

illegal dumping was not remote. Rather the chain of events that led to the illegal activity was clearly a foreseeable consequence. The overloaded vehicle which departed from Waste Conversion was loaded in excess by the employees of Waste Conversion. Thus, the impossibility defense was properly rejected in accordance with this Court's precedent.

Petitioner's reliance on United States v. Georgetown University, 331 F.Supp. 69 (D. D.C. 1971) provides no cognizable basis for this Court to grant review. Unlike petitioner, the defendant in Georgetown University was not the subject of heavy regulation.

The Pennsylvania Commonwealth Court did not decide an important question of federal law. The Commonwealth Court of Pennsylvania properly considered and

resolved petitioner's claims. No special or important reasons exist for this Court to exercise its discretion and grant the Petition.

CONCLUSION

For the foregoing reasons, the respondent requests the Court to deny the writ of certiorari.

Respectfully Submitted,

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Attorney General

Anthony Sarcione
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Director, Criminal Law Division

Robert A. Graci
Chief Deputy Attorney General
Appeals and Legal Services Section
Counsel of Record

Roseann B. Termini
Deputy Attorney General
Appeals and Legal Services Section

42 Pa.C.S. § 762. Appeals from courts of common pleas

(a) General rule.-Except as provided in subsection (b), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following cases:

(2) Governmental and Commonwealth regulatory criminal cases.-All criminal actions or proceedings for the violation of any:

(i) Rule, regulation or order of any Commonwealth agency.

(ii) Regulatory, statute administered by any Commonwealth agency subject to Subchapter A of Chapter 5 of Title 2 (relating to practice and procedure of Commonwealth agencies). The term "regulatory statute" as used in this subparagraph does not include any provision of Title 18 (relating to crimes and offenses).

Rule 2315. Time for Argument; Argument Lists

(a) General Rule. Oral argument is not a matter of right and will be permitted only to the extent necessary to enable the appellate court to acquire an understanding of the issues presented. The presiding judge may terminate the argument for any party notwithstanding the fact that the maximum time for argument specified in the applicable provision of these rules has not been exhausted.

(b) Assignment to lists. Argument lists shall consist of the regular list and short list. All cases listed for argument shall be placed upon the regular list unless all the parties upon praecipe to the prothonotary of the appellate court request the case to be placed upon the short list.

(c) Short list. The time for argument of cases on the short list shall be limited to not more than 15 minutes for each side. On days when there are cases on both the short list and on the regular list whose on the short list shall be heard first and in order of listing.

(d) Regular list. The time for argument of cases on the regular list shall be limited to not more than 30 minutes for each side. When there are two or more appeals from the same order, and in joint appeals, even though they raise different or unrelated questions, counsel for all the appellants will be

limited to a total of not more than 30 minutes for argument, and counsel for all the appellees to a total of not more than 30 minutes. The maximum time shall be divided between or among the appellants or between or among the appellees respectively as they may decide, subject to reduction as prescribed in Subdivision (a) of this rule.

Supreme Court, U.S.
FILED
SEP 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-299

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WASTE CONVERSION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF OF AMICUS CURIAE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF WASTE CONVERSION, INC.'S PETITION FOR WRIT OF CERTIORARI

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I. INTEREST OF AMICUS CURIAE

The Pennsylvania Chamber of Business and Industry (hereinafter the "Chamber") submits this Brief as Amicus Curiae in support of the Petition for Writ of Certiorari of Waste Conversion, Inc. (hereinafter referred to as "WCI") pursuant to Supreme Court Rule 37.2.

The Pennsylvania Chamber of Business and Industry is the statewide trade association representing all aspects of Pennsylvania commerce and industry. The Chamber's membership includes both large and small businesses. The purpose of the Chamber is to promote the welfare of commerce and industry in the Commonwealth in general, and specifically, to serve as liaison throughout the Commonwealth on issues affecting business and industry.

The pending Petition for Writ of Certiorari involves issues of vital importance to the Chamber and its members. The primary issue of concern to the Chamber is whether, pursuant to Section 610(8) of the Pennsylvania Solid Waste Management Act (hereinafter the "SWMA"), 35 P.S. §6018.610(8)(i), vicarious criminal liability may be imposed upon a business for acts or omissions of third parties. Many of the Chamber's members can and do assign wastes to independent waste transporters in accordance with the applicable laws and regulations. Pursuant to the rulings of the Pennsylvania courts in this case, those companies could be held vicariously liable for unlawful acts by such independent transporters. Those decisions, if upheld, will have a substantial detrimental impact on the Chamber and its member companies.

The Chamber submits that the Pennsylvania courts erred in finding that 35 P.S. §6018.610(8)(i) is constitutional to the extent that it permits the imposition of

vicarious criminal liability upon businesses for the unlawful acts of independent companies.

II. SUMMARY OF ARGUMENT

Section 610(8) of the Pennsylvania Solid Waste Management Act, 35 P.S. §6018.610(8), subjects a generator of waste to liability for unlawful disposal of waste transferred to a third party even if the generator complied with all applicable regulations and took all reasonable precautions to ensure proper and lawful transportation and disposition of the waste. Because this vicarious liability offense is punishable by imprisonment and punitive criminal fines, however, it is actually a "true crime" of which a person cannot be convicted absent evidence of criminal intent. To the extent that Section 610(8) imposes vicarious criminal liability, therefore, it violates the due process clause of the fourteenth amendment to the United States Constitution.

Moreover, although persons may be convicted of some "public welfare" offenses even in the absence of criminal intent, Section 610(8) cannot be defined as such an offense. This Court has emphasized that vicarious liability for public welfare offenses is permissible because the defendant is in some way able to control the unlawful conduct. Since Section 610(8) permits conviction even in the absence of any ability on the part of the defendant to control the unlawful conduct, it unlawfully imposes vicarious criminal liability.

If this Court permits the imposition of vicarious criminal liability upon businesses for the unlawful acts of independent companies, such a policy will have a substantial detrimental impact on the Chamber and its member

companies, as well as upon commerce throughout the Commonwealth of Pennsylvania, in neighboring states, and perhaps nationwide.

III. ARGUMENT

A. 35 P.S. §6018.610(8)(i), BY IMPOSING VICARIOUS CRIMINAL LIABILITY UPON BUSINESSES FOR THE UNLAWFUL CONDUCT OF THIRD PARTIES, IS UNCONSTITUTIONAL.

1. The Penalties Which May Be Imposed for Violation of 35 P.S. §6018.610 Establish That it is a "True Crime" of Which a Person Cannot Be Convicted Absent Evidence of Criminal Intent.

The applicable sections of the SWMA are set forth in WCI's Petition and the Appendices thereto. As those sections establish, criminal penalties may be imposed upon any and every party in the chain of custody of waste, whether hazardous or nonhazardous, for the illegal handling of that waste by any subsequent party in the chain of custody. More specifically, upon being found guilty of any "unlawful conduct," including that conduct described in Section 610(8), a person "shall be sentenced to pay a fine of not less than $1,000 but not more than $25,000 per day for each violation or to imprisonment for a period of not more than one year." 35 P.S. §6018.606(b). Thus, if a business is found vicariously liable under Section 610(8), and is therefore found guilty of a misdemeanor of the third degree pursuant to Section 606(b), it is subject to a fine of not less

than $1,000 per day or imprisonment for not more than one year, or both. The issue upon which the Chamber focuses in this Amicus Brief, then, is whether the SWMA is unconstitutional to the extent that it imposes criminal penalties, including potential imprisonment, upon persons or entities for the unlawful conduct of third parties over which they may have no control.

The constitutional protection upon which the Petitioner and the Chamber rely in challenging the SWMA is independently based in the due process clause of the United States Constitution (U.S. Const. Amend. XIV). This provision guarantees that a person is not to be deprived of life, liberty, or property without due process of law.

Included in the concept of due process is a degree of protection against the imposition of criminal liability without criminal intent on the part of the actor.

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. United States, 342 U.S. 246, 250, 72 S. Ct. 240, 243 (1951) (footnote omitted). The federal courts have recognized that there are due process limitations on the legislative power to remove intent from a criminal enactment. See, e.g., Morissette v. United States, supra. In Morissette, supra, this Court distinguished common law crimes from regulatory or "public welfare" offenses, which consist mainly of violations of regulatory provisions dealing with public health, safety, and welfare. Morissette v. United States, supra, 342 U.S. at 254, 72 S. Ct. at 245. The Court

noted that such regulatory or "public welfare" offenses do not come under any

> accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. ...In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and a conviction does no grave damage to an offender's reputation.

Morissette v. United States, supra, 342 U.S. at 255-56, 72 S. Ct. at 246 (footnotes omitted).

In Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960), Justice Blackman, then a Circuit Judge, distilled from Morissette, supra, and other cases, the wisdom of the Supreme Court on the permissibility of imposing criminal sanctions on actions done without intent:

> From these cases emerges the proposition that where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard

> imposed is, under the circumstances, reasonable and adherence thereto properly expected of person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge v. United States, supra, 282 F.2d at 310 (citations omitted). Of course, should the factors enumerated above be otherwise with respect to a given statute or regulation then the elimination of intent from the legislation or regulation may violate due process of law. See, e.g., Commonwealth v. Barone, 276 Pa. Super. 282, 419 A.2d 457 (1980) (Spaeth, J., concurring).

Thus, under the due process clause of the Fourteenth Amendment to the United States Constitution, the Courts have determined that while a defendant may be held vicariously liable for a "public welfare" offense, a defendant may not be found guilty of a "true crime" absent the requisite "mens rea" or criminal intent. Because Section 610(8) of the SWMA clearly contains no "mens rea" or criminal intent requirement, it can pass constitutional muster only if it is properly defined as a "public welfare" offense rather than a "true crime."

Since the SWMA would permit a court to imprison an individual for an offense which does not involve "personal causation" in that guilt can be based solely on a finding of vicarious liability under Section 610(8), the SWMA violates the standards set forth in Morissette and its progeny. Since punitive fines or even imprisonment may be imposed upon a person for violation of that section, it is a "true crime"

rather than a "public welfare" offense. By permitting persons to be convicted of a "true crime" without requiring evidence of criminal intent, Section 610(8) violates the due process clause of the Fourteenth Amendment.

Violation of Section 610(8) cannot be considered a "public welfare" offense because the factors which the courts have identified which would permit convictions for public welfare offenses even in the absence of mens rea are not applicable to Section 610(8). As noted above, the United States Supreme Court discussed public welfare offenses as follows:

> Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize.... In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity.... The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

Morissette v. United States, supra, 342 U.S. at 255-56, 72 S. Ct. at 246 (footnote omitted). The penalties under the SWMA are not "relatively small" and a conviction does "gravely damage" the purported offender's reputation.

Moreover, the Chamber also notes that the Morissette analysis implies that the reason a person may be held vicariously liable for public welfare offenses is because the "accused" is "in a position to prevent [the offense] with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." Id. Unfortunately, this is not the case with respect to Section 610(8) of the SWMA. Indeed, that section exposes every party in the chain of custody of waste to potential criminal prosecution, and indeed imprisonment, for the illegal handling of that waste by any subsequent party in the chain of custody despite good faith compliance efforts, and indeed, despite totally blameless conduct on the part of the previous parties in the chain of custody. Moreover, the SWMA contains no geographic or time limitations which would minimize a business' potential liability.

Furthermore, a generator who complies with all regulations and permits is not "in a position to prevent [the offense] with no more care than society might reasonably expect." Rather, Section 610(8) permits absolute vicarious criminal liability with potential penalties of $25,000 and/or imprisonment for one year, despite the generator's total inability to prevent the ultimate unlawful activity. Indeed, the Chamber submits that this Court should focus on the fact that liability may be imposed under Section 610(8) despite a party's lack of "control" over the unlawful conduct of a third party. Even those cases which have permitted vicarious liability for "public welfare" offenses have supported their finding by noting that it was not improper to hold an individual vicariously liable because he had some "control" over the individual who acted unlawfully or over the unlawful act itself.

Thus, because Section 610 of the Pennsylvania Solid Waste Management Act establishes a "true crime" rather

than a "public welfare offense," that provision is unconstitutional to the extent that it permits the imposition of vicarious criminal liability upon businesses for the unlawful acts of independent companies.

2. Policy Considerations Require That This Court Declare Section 610(8) of the SWMA Unconstitutional.

Under Section 610(8) of the SWMA, criminal liability may be imposed upon any business in the chain of custody of waste despite the fact that it is "in no position to control" the unlawful conduct. Imposing criminal liability on the first person in the chain of custody who acts in a totally blameless fashion for the unlawful conduct of a third party perhaps six links removed in the chain can in no way further the goals of the SWMA. Unlawful conduct by a third party over which the blameless party has no control cannot be deterred by imputing vicarious liability to the blameless party.

The Chamber submits that permitting such vicarious liability for acts over which a party has absolutely no control, and despite the good faith compliance efforts of the defendant, is not only unconstitutional but will have an enormous detrimental impact on business and industry throughout the Commonwealth, in neighboring states, and perhaps nationwide. Waste generators face the greatest exposure under Section 610(8) of the SWMA since they are at the beginning of the waste's chain of custody. If the Pennsylvania courts' decisions are permitted to stand, generators will be increasingly reluctant to do business in the Commonwealth if, as a by-product of their activities, they may be subject to significant fines or even imprisonment for the conduct of independent third parties over whom they

have no control. Moreover, the SWMA, as interpreted by the Pennsylvania courts, will impact not only Pennsylvania companies operating within the Commonwealth, but any company that has its waste shipped to, or even through, Pennsylvania. The effect of this legislation on interstate commerce, then, is potentially enormous and burdensome.

It would appear that the principle objective in permitting vicarious criminal liability for violations of the SWMA is to encourage all parties in the waste chain of custody to exercise due care in transporting and disposing of the waste. If, however, a party cannot realistically influence the conduct of another, this objective cannot be met. In many cases, such as the one at bar, the first party in the chain of custody cannot possibly prevent the unlawful conduct of parties further down the chain of custody. The imputation of criminal liability upon the first party, therefore, is fallacious and has no legal foundation. Perhaps more importantly, businesses that operate or handle solid waste will be reluctant to operate in Pennsylvania because of the possibility of being convicted of strict liability offenses on purely vicarious grounds. As a result, the interstate movement of waste materials and all associated commercial activity will be seriously impeded.

Although the Chamber applauds the efforts of the Legislature of the Commonwealth of Pennsylvania to control the flow of waste throughout the Commonwealth, the vicarious liability provision of Section 610(8) serves only to interfere with private companies' attempts to participate in those efforts. Indeed, if the Pennsylvania courts' interpretations are permitted to stand, Section 610(8) will have a deleterious and detrimental effect on all businesses and industries operating within the Commonwealth of Pennsylvania, whether or not those companies are incorporated or headquartered in Pennsylvania.

Because a finding of vicarious liability under Section 610(8) of the SWMA cannot further the goals of the SWMA, and because a finding of a violation of that section cannot be defined as a "public welfare" offense but rather must be considered a "true crime," to the extent that it subjects a violator to punitive fines and imprisonment, that section is unconstitutional.

IV. CONCLUSION

For the reasons set forth above, the Pennsylvania Chamber of Business and Industry, as amicus curiae, respectfully requests that this Court grant WCI's Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 90-299

IN THE
SUPREME COURT OF THE UNITED STATES

WASTE CONVERSION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

CONSENT TO FILING OF AMICUS CURIAE BRIEF BY THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY

The undersigned, counsel to the above-referenced parties, Waste Coversion, Inc. and the Commonwealth of Pennsylvania, hereby consent to the filing of an Amicus Curiae Brief by the Pennsylvania Chamber of Business and Industry in Support of the Petition for Writ of Certiorari filed by Waste Conversion, Inc.

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